INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	3
Argument	5
Conclusion	7

CITATIONS

Cases:

Sowell v. *Federal Reserve Bank*, 268 U.S. 449	6
United States v. *Behrens*, 230 F. 2d 504, certiorari denied, 351 U.S. 919	6
United States v. *Bess*, 357 U.S. 51	5, 6
United States v. *Boyd*, 246 F. 2d 477, certiorari denied, 355 U.S. 889	6
United States v. *Peoples Bank*, 197 F. 2d 898	6
United States v. *Wintner*, 200 F. Supp. 157, affirmed *per curiam*, C.A. 6, January 18, 1963	7

Statutes:

Internal Revenue Code of 1939:	
Sec. 3670 (26 U.S.C. 1952 ed., 3670)	2
Sec. 3671 (26 U.S.C. 1952 ed., 3671)	2
Internal Revenue Code of 1954:	
Sec. 6323 (26 U.S.C. 6323)	2
Sec. 7403 (26 U.S.C. 7403)	3

674869—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 757

ETHEL MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 17–19) is reported at 202 F. Supp. 606. The opinion of the court of appeals (Pet. 19–20) is reported at 309 F. 2d 131.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1962 (Pet. 21). The petition for a writ of certiorari was filed on January 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the courts below correctly held that federal tax liens upon the cash surrender value of life insur-

ance policies, which had been assigned prior to the assessment of the taxes as security for a bank loan, could be satisfied out of the proceeds of the policies that remained after the bank loan had been paid.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., 3671.)

Internal Revenue Code of 1954:

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be

valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

* * * * *

(26 U.S.C. 6323.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

* * * * *

(26 U.S.C. 7403.)

STATEMENT

Peter Meyer owned four life insurance policies of which his wife was the beneficiary. He retained the right to change the beneficiary, demand the cash surrender value and assign the policies. The face amounts of the policies totaled $50,000, and the cash surrender values at his death on December 28, 1955, totaled $27,285.87. (Pet. 17; R. 18a–19a.)

At the date of his death, Meyer owed income taxes to the United States for the years 1945 and 1946, totaling $6,159.09, plus interest. The taxes due for 1945 had been assessed in May, 1946, and those due for 1946 had been assessed in June, 1947. Notice of assessment and demand for payment was made upon Meyer by the Collector and notice of lien was filed by the District Director in July, 1955. (Pet. 17; R. 18a.)

In 1943, prior to the tax assessments, Meyer pledged and assigned the policies to the Huntington National Bank of Columbus, Ohio, as security for a loan of $26,844.66. Under the terms of the assignment or pledge, the bank was also given the right to satisfy its claim out of the "net proceeds of the policy when it becomes a claim by death." (Pet. 17; R. 20a.) Upon the death of Meyer, the insurance company paid the bank $26,844.66 and paid the remainder of the proceeds to Ethel Meyer, his widow (Pet. 17; R. 20a, 24a–25a).

In September, 1958, the United States commenced suit against Mrs. Meyer individually and as executrix of the estate of her husband for $6,159.09, the amount of Meyer's unpaid 1945 and 1946 income taxes, plus interest (R. 4a–11a). The district court granted the government's motion for summary judgment, holding that the United States could satisfy its tax lien on the cash surrender value of the policies out of the proceeds of the insurance received by Mrs. Meyer (Pet. 17–18; R. 29a). The court of appeals affirmed.

ARGUMENT

The decision below is correct. There is no conflict between two circuits or other occasion for review.

1. The court below correctly held that the federal tax lien on the cash surrender value of the taxpayer's insurance policies, which had been assigned as security for a prior bank loan, could be satisfied out of the proceeds of the policies. The ruling is fully supported by this Court's holding in *United States* v. *Bess*, 357 U.S. 51, that the federal tax lien, arising during the taxpayer-insured's lifetime, attaches to the cash surrender value of the insurance and may be collected from the proceeds in the hands of the beneficiary. The rationale of *Bess* is that the proceeds of an insurance policy represent two funds, the cash surrender value "plus another amount sufficient to perform the insurer's promise to pay the proceeds on the insured's death" (357 U.S., p. 59). In *Bess* this Court said that the cash surrender value is the taxpayer's property during his lifetime; and that such amount represents, in a level premium policy, the excess of early premiums over amounts needed to pay for current insurance, which is held by the insurer for the sole purpose of paying premiums in later years, to be returned to the insured if not so used.

The only difference between *Bess* and the instant case is that here the taxpayer had assigned the insurance policies as security for a bank loan prior to the federal tax lien, and that the loan was repaid at the taxpayer's death by the insurer before the proceeds were turned over to the taxpayer's beneficiary, the

petitioner here. These facts do not alter the applicability of the *Bess* ruling. After the assignment of the policy to the bank as security for its loan, the taxpayer retained a continuing interest in the cash surrender value to which the federal tax lien applied, since he could at any time secure the cash surrender value by paying the bank loan. See *United States* v. *Peoples Bank*, 197 F. 2d 898 (C.A. 5); *United States* v. *Boyd*, 246 F. 2d 477 (C.A. 5), certiorari denied, 355 U.S. 889.

Since the insurance company had a claim against both the "net proceeds of the policy when it became a claim by death" (Pet. 17) and the cash surrender value, while the United States had a claim against only the latter, the court below properly marshalled the assets "upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." *Sowell* v. *Federal Reserve Bank*, 268 U.S. 449, 457. The court therefore correctly treated the insurance company's claim as having been paid out of the general proceeds of the policy, thus permitting the federal tax claims to be satisfied out of the portion of the proceeds representing the cash surrender value.

2. There is no conflict of decisions. The court below followed its earlier decision in *United States* v. *Behrens*, 230 F. 2d 504, certiorari dened, 351 U.S. 919. There the court relied on the two-fund character of life insurance proceeds as a basis for similarly marshalling assets in order to satisfy both a federal tax lien and a

bank loan out of such proceeds. To the same effect, see *United States* v. *Wintner*, 200 F. Supp. 157 (N.D. Ohio), affirmed *per curiam*, C.A. 6, January 18, 1963.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH KOVNER,
MICHAEL MULRONEY,
Attorneys.

FEBRUARY 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963